Supreme Court, U.S.
FILED

031321 MAR 17 2004

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ROTEC INDUSTRIES, INC.,
A DELAWARE CORPORATION, PETITIONER

v.

MITSUBISHI CORPORATION, A CORPORATION ORGANIZED UNDER THE LAWS OF JAPAN; TUCKER ASSOCIATES INC., AN OREGON CORPORATION; GARRY TUCKER, AN INDIVIDUAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEORGE P. MCANDREWS
Counsel of Record
GERALD C. WILLIS
MCANDREWS HELD & MALLOY, LTD.
500 West Madison Street
Suite 3400
Chicago, IL 60661
312-775-8000
Attorneys for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Are the States of the United States of America still permitted to establish their own laws that are not in conflict with any federal laws? If so, are federal courts, when deciding cases involving a state law claim, bound to follow established state law?

> 1 (a). Stated differently, can federal courts totally ignore established state law when deciding issues of state law?

2. Assuming personal jurisdiction and the requisite contacts are satisfied, can domestic corporations take action against foreign (*i.e.*, alien) corporations for conduct that violates § 2(c) of the Robinson-Patman Act where some or all of the wrongful conduct took place in a foreign country and, where that conduct directly impacts a United States' corporation's domestic and/or foreign commerce?

3. Is the jurisdictional scope of § 2(c) of the Robinson-Patman Act limited to the jurisdictional scope of § 2(a) of the Robinson-Patman Act?

LIST OF PARTIES

The parties to this action are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Rotec Industries, Inc. is a closely held Delaware corporation, with its principal place of business located in Elmhurst, Illinois. Rotec Industries, Inc. does not have a parent corporation and no publicly held company owns any of its stock.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Corporate Disclosure Statement ii

Table of Contents iii

Table of Cited Authorities v

Opinion Below 1

Statement Of Jurisdiction 1

Constitutional And Statutory Provisions, And Supreme Court Precedents Involed 1

Statement Of The Case 6

Reasons For Allowance Of The Writ 10

I. REVIEW IS WARRANTED TO PRESERVE THE RIGHTS OF STATES TO EXPRESS THEIR OWN LAWS AND TO ENSURE CONSISTANT APPLICATION OF THOSE LAWS BEING APPLIED BY THE FEDERAL COURTS 12

A. In Its Decision On Rotec's Tortious Interference Claim, The Ninth Circuit Failed To Apply The Established Law Of Oregon 13

B. Under Oregon Law The Jury Determines Whether The Admittedly Improper Interference Caused The Harm To The Plaintiff 16

II. THE NINTH CIRCUIT USED THIS COURT'S DECISION IN *GULF OIL*, WHICH ADDRESSED THE JURISDICTIONAL SCOPE OF SECTION 2(A) OF THE ROBINSON-PATMAN ACT, TO OVERTURN LONG STANDING PRECEDENT ON THE JURISDICTIONAL SCOPE OF SECTION 2(C) OF THE ACT 19

III. CONCLUSION 24

Appendix

Opinion Of The United States Court Of Appeals For The Ninth Circuit Decided And Filed November 10, 2003. ..... 1a

Opinion Of The United States District Court For The District Of Oregon, Decided And Filed September 14, 2001. ..... 14a

Opinion Of The United States District Court For The District Of Oregon, Decided And Filed February 1, 2002. ..... 39a

Order Of The United States Court Of Appeals For The Ninth Circuit Denying Plaintiff/Appellant's Petition For Rehearing Or In The Alternative Petition For Rehearing E*n Banc*, Decided And Filed December 18, 2003. ..... 54a

TABLE OF CITED AUTHORITIES

Cases

Biddle Purchasing Co. v. Federal Trade Comm'n,
96 F.2d 687 (2nd Cir. 1938) 22

Erie Railroad Co. v. Tompkins,
304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 16

Federal Trade Comm'n v. Henry Broch & Co.,
363 U.S. 166, 80 S. Ct. 1158 (1960) 22

Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n,
106 F.2d 667, (3rd Cir. 1939) 22

Gulf Oil Corp. v. Copp Paving Co., Inc.,
419 U.S. 186 (1974) ..... *passim*

Kalgaard v. Lindo Mar Adventure Club, Ltd.,
147 Or. App. 61, 934 P.2d 637 (Or. App. 1997) ..*passim*

Matsushita Electric Industrial Co. v. Epstein, et al.,
516 U.S. 367 (1996) 16

Mauri v. Smith,
135 Or. App. 662, 901 P.2d 247 (1995) 17

May Dep't Store v. Graphic Process Co.,
637 F.2d 1211 (9th Cir. 1980) 21

McGanty v. Staudenraus,
321 Or. 532, 901 P2d 841 (1995) 14

Moore v. Mead's Fine Bread,
348 U.S. 115, 75 S. Ct. 148 (1954) 22

New Hampshire Insurance Company v. Viera, et al.,
930 F.2d 696 (9th Cir. 1991) 6, 8

Oliver Bros. v. Federal Trade Comm'n,
102 F.2d (4th Cir. 1939) 22

Rangen, Inc. v. Sterling Nelson & Sons,
351 F.2d 851 (9th Cir. 1965) 9, 12

Rotec Indus., Inc. v. Mitsubishi Corp., et al.,
163 F. Supp. 2d 1268 (D. Ore. 2001) 1

Rotec Indus., Inc. v. Mitsubishi Corp., et al.,
181 F. Supp. 2d 1173 (D. Ore. 2002) 1

Rotec Indus., Inc. v. Mitsubishi Corp., et al.,
348 F.3d 1116 (9th Cir. 2003) 1

Thurman Industries, Inc. v. Pay'n Pak Stores, Inc.,
709 F. Supp. 985 (W.D. Wash. 1987) 20

West v. American Tel. & Tel. Co.,
311 U.S. 223, 61 S. Ct. 179,
85 L. Ed. 139 (1940) 6, 11, 13, 15

Statutes

15 U.S.C. § 13(a) ..... *passim*

15 U.S.C. § 13(c) ..... *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1738 16

Robinson-Patman Act ..... *passim*

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Rotec Indus., Inc. v. Mitsubishi Corp., et al.*, 348 F.3d 1116 (9th Cir. 2003). (*See* Appendix, at pp. 1a-13a.) The Ninth Circuit affirmed the September 14, 2001 and February 1, 2002 decisions of the United States District Court for the District of Oregon, reported at *Rotec Indus., Inc. v. Mitsubishi Corp., et al.*, 163 F. Supp. 2d 1268 (D. Ore. 2001) and *Rotec Indus., Inc. v. Mitsubishi Corp., et al.*, 181 F. Supp. 2d 1173 (D. Ore. 2002). (*See* Appendix, at pp. 14a-38a and 39a-53a.)

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit's opinion was rendered on November 10, 2003 and the Petition for Rehearing or Alternatively for Rehearing *En banc* was denied on December 18, 2003. (*See* Appendix, at p. 54a.)

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND SUPREME COURT PRECEDENTS INVOLVED

United States Constitution Article IV, Section 1:

> Full faith and Credit shall be given in each State to the public acts, Records,

and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are preserved to the States respectively, or to the people.

Constitution Of The State Of Oregon, Article VII, Section 3:

In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict. Until otherwise provided by law, upon appeal of any case to the supreme court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal. If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the

case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the supreme court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court. Provided, that nothing in this section shall be construed to authorize the supreme court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower court.

Title 15 United States Code, Section 13(c):

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting

in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Title 15 United States Code, Section 13(a):

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting

from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That noting herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

SUPREME COURT PRECEDENT.

West v. American Tel. & Tel. Co., 311 U.S. 223 (1940).

Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186 (1974).

STATEMENT OF THE CASE

1. Petitioner, Rotec Industries, Inc. ("Rotec"), a Delaware corporation with its principal place of business in Illinois, asserts in this case that The Respondents, Mitsubishi Corporation, a Japanese corporation, Tucker Associates, Inc., an Oregon corporation, And Garry Tucker, of Oregon (hereinafter collectively referred to as "Mitsubishi"), violated 15 U.S.C. § 13(c) (§ 2(c) of the Robinson-Patman Act) in procuring a contract for the sale of two concrete conveying machines to the Chinese Three Gorges Development Project Corporation (the "Buyer"), by means of bribery. Mitsubishi's violation of § 2(c), among other improper conduct described below, gave rise to Rotec's common law tortious interference with a prospective economic advantage claim under the established laws of the State of Oregon.

This case involves a dispute about the procurement of construction contracts centered around the construction of the Three Gorges Dam on the Yangtze River in China. The dam was and is being constructed in three stages. Rotec has been in the business of selling massive volume concrete placement equipment for several decades and has been involved in

the construction of dams all over the world. One of the main products that Rotec sells is a tower crane and conveyor system called the Tower Belt, which is designed to be able to place huge volumes of concrete across a vast area. Rotec executed a contract with the Buyer in 1994 for the concrete placement during Stage I construction and sold, constructed and assisted in the operation of one Tower Belt system at Three Gorges during Stage I construction.

The Buyer conducted an open bidding process for Stage II construction (specifically for the concrete placement), for authorized bidders only. Bid proposals for Stage II construction were submitted on or about January 15, 1996. Only Rotec's and Mitsubishi's bid proposals included Tower Belt type systems and they were ultimately the only two competitors negotiating with the Buyer.

On November 1, 1996, Rotec executed a contract for the sale of three Tower Belt units with the Buyer for Stage II construction, which included a binding option to purchase provision, granting the Buyer the option to purchase two additional Tower Belt units for the set price of $15,859,500. On December 16, 1996, the Buyer executed a contract with Mitsubishi for the sale of two of its competing Top Belt systems (which were copies of Rotec's Tower Belt machines) for $17,825,190, nearly $2,000,000 more than it could have paid for the same machines from Rotec. As a result of Mitsubishi's sale to the Buyer, Rotec lost the sale of its two additional Tower Belt units.

Through discovery in an earlier case between these two parties, Rotec learned that Mitsubishi had

improperly tampered with the contract evaluation process by: (1) offering a job to one of the Buyer's evaluation committee members; (2) engaging in continuous improper communications with other evaluation committee members, which was expressly prohibited by the Buyer's bidding procedures, and receiving inside information and advice from those committee members; and (3) executing an agreement to pay an illegal commission back to the Buyer. The illegal commission was to be deposited in an off-shore account, in then British ruled Hong Kong. For purposes of its decision on Rotec's claims, the Ninth Circuit presumed that Mitsubishi had "bought off" at least two evaluation committee members and that the agreement to pay the .5% commission was improper. (Appendix, at p. 11a.) The Ninth Circuit and the district court presumed that every element of Rotec's tortious interference claim was satisfied except for the causation element (*Id.*), which under the applicable law of Oregon (including Article VII, Section 3 of the Oregon Constitution protecting the right to a trial by a jury), is an issue that should be determined by a jury.[1]

In its decision, the Ninth Circuit affirmed the district court's ruling, granting Mitsubishi's motion for summary judgment on Rotec's tortious interference claim, but failed to address or even mention the leading Oregon case of *Kalgaard v. Lindo Mar Adventure Club, Ltd.*, 147 Or. App. 61, 934 P.2d 637 (Or. App. 1997), cited and relied upon by Rotec. *Kalgaard* stands for the proposition that the causation element in tortious

---

[1] The Ninth Circuit's decision also brings into consideration the right to a trial by a jury under the Seventh Amendment of the United States Constitution. U.S. CONST. amend. VII.

interference claims should be decided by a jury. *Id.* at 640.

Also in its decision, the Ninth Circuit affirmed the district court's ruling, granting Mitsubishi's motion for summary judgment on Rotec's antitrust claim. The Ninth Circuit's decision overruled the long standing (38 years) Ninth Circuit precedent set forth in *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965), which addressed the jurisdictional scope of § 2(c) of the Robinson-Patman Act. In *Rangen*, the Ninth Circuit held that the jurisdictional scope of § 2(c) of the Robinson-Patman Act was broader than that of § 2(a) (15 U.S.C. § 13(a)). *Rangen*, 351 F.2d, at 861. In overruling the Ninth Circuit's precedent, the Ninth Circuit relied upon this Court's analysis of § 2(a) of the Robinson-Patman Act in *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974), holding that the *Gulf Oil* decision spoke to the jurisdictional requirements of the Robinson-Patman Act in its entirety. (*See* Appendix, at 8a). The Ninth Circuit's holding contradicts well established precedent requiring that each section of the Act be independently construed, all principles of statutory construction, and begs the question -- if the jurisdictional scope set forth in § 2(a) was meant to apply to all sections of the Robinson-Patman Act, why did Congress expressly provide a differently described jurisdictional requirement for § 2(c) of the Robinson-Patman Act?

2. Rotec filed its Complaint in the United States District Court for the District of Oregon on October 12, 2000. On February 14, 2001, Mitsubishi filed its motion to dismiss or alternatively for summary judgment. On September 14, 2001, the district court granted

Mitsubishi's motion for summary judgment in part, granting Mitsubishi's motion on Rotec's Robinson-Patman Act claim and denying Mitsubishi's motion on Rotec's tortious interference claim. (Appendix, at pp. 14a-38a.) On October 16, 2001 Mitsubishi filed a second motion for summary judgment, rearguing the motion for summary judgment on Rotec's tortious interference with a prospective economic advantage claim. On February 1, 2002, the district court granted Mitsubishi's motion for summary judgment on Rotec's state law tortious interference claim. (Appendix, at pp. 39a-53a.)

3. Petitioner filed its Notice of Appeal on March 1, 2002. On November 10, 2003, the Ninth Circuit entered its decision, affirming the district court's decisions. (Appendix, at pp. 1a-13a.) On November 24, 2003, Petitioner filed its Petition for Rehearing or in the Alternative, Petition for Rehearing *En Banc*. On December 18, 2003, the Ninth Circuit denied the Petition for Rehearing or in the Alternative Petition for Rehearing *En Banc*. (Appendix, at p. 54a.)

REASONS FOR ALLOWANCE OF THE WRIT

In the Ninth Circuit's decision on Rotec's tortious interference with a prospective economic advantage claim, the Court completely ignored established Oregon precedent. (Appendix, at 10a-12a.) The Ninth Circuit did not even mention the leading Oregon case of *Kalgaard* in its opinion. *Kalgaard*, 934 P.2d at 640. By ignoring Oregon's precedent, the Ninth Circuit has undermined the Full Faith and Credit clause of Article IV of the Constitution, the Tenth

Amendment of the Constitution preserving the rights of the States to establish their own laws, and the long established precedent of this Court, requiring federal courts, when determining issues of state law, to apply state court interpretations of the particular state's substantive law. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940); *See also, New Hampshire Insurance Company v. Viera, et al.*, 930 F.2d 696, 701 (9th Cir. 1991). The Ninth Circuit's decision, or at least the result of the Ninth Circuit's decision, is in direct conflict with this Court's sixty-four year old precedent and the Constitutional provisions cited above. Therefore, this is a critical issue and this Court's review is justified in order to preserve the States' sovereign rights to establish their own laws and to have those laws consistently applied in the federal courts of the United States. This is particularly true where the State's law states that the issue involved should be decided by a jury, not the court.

The Ninth Circuit also affirmed the district court's decision and interpretation of *Gulf Oil*, 419 U.S. at 186, holding that this Court's analysis of the jurisdictional scope of § 2(a) of the Robinson-Patman Act was applicable to claims arising under § 2(c) of the Act. (Appendix, at 8a.) The Ninth Circuit made that decision despite the fact that Congress took the time to draft separate and different jurisdictional provisions for each section of the Act and despite the fact that the *Gulf Oil* opinion never once mentions § 2(c). Historically, the Circuit Courts have held that the jurisdictional scope of § 2(c) is broader than that of § 2(a). The Ninth Circuit's leap of logic in applying the jurisdictional scope of § 2(a) of the Robinson-Patman to § 2(c) of the Act, which has its own separate and

distinct jurisdictional provision, merits this Court's review.

The Ninth Circuit's decision, based upon its interpretation of *Gulf Oil*, overturned precedent that had been in place for over thirty-five years. *Rangen*, 351 F.2d at 851. In rendering its decision, the Ninth Circuit has left domestic corporations that compete against foreign (*i.e.*, alien) corporations domestically and abroad, with no remedy against those foreign corporations that engage in the type of conduct prohibited by § 2(c) of the Robinson-Patman Act. Under the rationale of the Ninth Circuit's decision, foreign corporations can use tactics such as bribery and illegal commission arrangements to obtain contracts abroad, thereby preventing export opportunities for United States' corporations and allowing those foreign corporations to strengthen their competitiveness here in the United States. This is an important issue that merits this Court's review, particularly in today's global economy, where United States' corporations are now more than ever simultaneously competing with foreign corporations domestically and abroad.

I. REVIEW IS WARRANTED TO PRESERVE THE RIGHTS OF STATES TO EXPRESS THEIR OWN LAWS AND TO ENSURE CONSISTANT APPLICATION OF THOSE LAWS BEING APPLIED BY THE FEDERAL COURTS

The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are preserved to the States respectively, or to the people." U.S. CONST.

amend. X. Article IV, Section 1 states: "Full faith and Credit shall be given in each State to the public acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof." U.S. CONST. art. IV, § 1. This Court has also held that federal courts are to apply the laws of the applicable state when deciding issues or claims based on state law. *West*, 311 U.S. at 327.

A. In Its Decision On Rotec's Tortious Interference Claim, The Ninth Circuit Failed To Apply The Established Law Of Oregon

In affirming the district court's award of summary judgment in favor of Mitsubishi, the Ninth Circuit failed to discuss or even acknowledge established Oregon precedent set forth in *Kalgaard*.[2] (*See* Appendix, at pp. 10a-12a.); *Kalgaard*, 934 P.2d at 640. Rotec alleged that Mitsubishi tortiously interfered with its prospective economic advantage. The elements of a tortious interference claim under Oregon law are:

> (1) the existence of a professional or business relationship, (which could include, *e.g.*, a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third party, (4) accomplished through improper means or for an improper

[2] If the Ninth Circuit did consider *Kalgaard, sub silentio*, then it completely disregarded Oregon law.

> purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages.

McGanty v. Staudenraus, 321 Or. 532, 535, 901 P2d 841, 844 (1995) (*En banc*).

During the proceedings below, Rotec presented evidence establishing that Mitsubishi had: (1) improperly offered a quality control job to one of the Buyer's contract evaluation committee members in violation of the Foreign Corrupt Practices Act (15 U.S.C. § 78dd-2.); (2) continuously communicated with members of the contract evaluation committee during the evaluation process in violation of the Buyer's express prohibition of such communications; and (3) agreed to pay a secret and illegal commission back to the Buyer in violation of § 2(c) of the Robinson-Patman Act (15 U.S.C. § 13(c)),[3] after Rotec had executed a binding option contract with the Buyer for the sale of the additional two Tower Belt units. Both the district court and the Ninth Circuit presumed all of the elements of the tort had been satisfied except the element of causation.

Despite the fact that all of the other elements of the tort were presumed to be present, including multiple examples of Mitsubishi's improper and/or illegal conduct, the Ninth Circuit held that there was no evidence that the wrongful conduct influenced the

---

[3] The illegal commission agreement and improper communications with the evaluation committee took place in China. The authorization for the illegal quality control job came from the United States.

Buyer to award the contract to Mitsubishi. (Appendix, at pp.11a-12a.) The Ninth Circuit's decision directly contradicts the leading Oregon case on the causation issue, which stands for the proposition that the element of causation in tortious interference cases should be left for the jury. *Kalgaard*, 934 P.2d at 640. In determining issues of state law, federal courts are bound by state court interpretations of the particular state's substantive law. *West*, 311 U.S. at 237.

In *West*, this Court held:

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts.

Id. (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).[4] The Ninth Circuit ignored the laws of Oregon and in doing so, ignored Article IV, Section 1 of the Constitution, the Seventh and Tenth Amendments to the Constitution, Article VII Section 3 of the Oregon Constitution and the precedent set forth by this Court in *West*.

B. Under Oregon Law The Jury Determines Whether The Improper Interference Caused The Harm To The Plaintiff

In *Kalgaard*, the defendant/counter-plaintiff (hereinafter "Counter-plaintiff") counter-claimed against Kalgaard for intentionally interfering with its prospective purchase of the Lindo Mar resort. The Counter-plaintiff and the prospective buyer signed a letter of intent for the sale of the resort and many of the details were agreed upon. During the negotiating process, Kalgaard sent letters to, had phone calls with, and personally met with the prospective seller attempting to deter the prospective seller from selling the Lindo Mar resort. Several months after Kalgaard's communications with the prospective seller, he cancelled the prospective sale. *Kalgaard*, 934 P.2d, at 638.

---

[4] *See also, Matsushita Electric Industrial Co. v. Epstein, et al.*, 516 U.S. 367, 373 (1996) ("The Full Faith and Credit Act mandates that the 'judicial proceedings' of any State 'shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken.'") (citing 28 U.S.C. § 1738).

During the court proceedings, the parties deposed the prospective seller, who testified under oath that he terminated the sale upon the advice of his attorney and his wife, not because of Kalgaard's actions. *Id.*, at 639. The prospective seller's sworn testimony was the only evidence as to what influenced the prospect seller's decision. There was no evidence of record to support a causal connection between Kalgaard's wrongful conduct and the prospective seller's decision to terminate the prospective deal, other than Kalgaard's improper conduct. Based on those facts, the lower court granted Kalgaard's motion for summary judgment, finding no evidence of causation. *Id.*

However, the Oregon appellate court reversed the lower court, recognizing that "Proof of what motivates a person to act is almost always circumstantial and inferential." *Kalgaard*, 934 P.2d at 640 (citing *Mauri v. Smith*, 135 Or. App. 662, 676, 901 P.2d 247 (1995). The Oregon appellate court held that "[I]f the record contains facts that create a plausible inference that a person's statements about his or her conduct are not true, summary judgment is inappropriate." *Kalgaard*, 934 P.2d, at 640. Thus, despite the fact that the only evidence relating to causation element in *Kalgaard* favored Kalgaard, the Oregon Appellate court held that it was plausible that the jury could still find that Kalgaard's wrongful conduct did in fact cause the prospective buyer to terminate the prospective deal, irrespective of the prospective seller's sworn testimony. *Id.* The only way the jury could make that determination was through weighing the circumstances and inferences surrounding

the prospective deal, and the credibility of the witnesses.

Here, just as in *Kalgaard*, every element of the tort was satisfied (including the conduct that constituted the improper interference) except for the element of causation. However, unlike *Kalgaard*, there was no sworn testimony from the Buyer denying that the illegal commission influenced its decision. Hence, the causation element in Rotec's claim was even stronger than that of the Counter-plaintiff in *Kalgaard*. Therefore, if the Ninth Circuit would have applied Oregon law, it would have had to reverse the district court's decision.

The Ninth Circuit's failure to address the *Kalgaard* decision and, in fact, issuing a decision that is in direct contradiction with *Kalgaard*, threatens to undermine well-established Oregon law. This issue is of exceptional importance to: (1) preserve Oregon's sovereign right to establish its own laws under the Tenth Amendment to the Constitution; (2) uphold Article IV's Full Faith and Credit clause of the Constitution; (3) uphold this Court's precedent, requiring federal courts to follow state law when applying same; and (4) preserve Rotec's constitutional right to a trial by a jury under the Seventh Amendment of the Constitution of the United States and Article VII, Section 3 of the Constitution of the State of Oregon.

II. THE NINTH CIRCUIT USED THIS COURT'S DECISION IN *GULF OIL*, WHICH ADDRESSED THE JURISDICTIONAL SCOPE OF SECTION 2(a) OF THE ROBINSON-PATMAN ACT, TO OVERTURN LONG STANDING PRECEDENT ON THE JURISDICTIONAL SCOPE OF SECTION 2(c) OF THE ACT

In the *Gulf Oil* case, this Court was expressly addressing § 2(a) of the Robinson-Patman Act. Nothing in this Court's opinion could lead to the conclusion that the jurisdictional requirements of § 2(a) were controlling over every section of the Robinson-Patman Act, as reflected by the Court's express language and its efforts to make it clear that its analysis only applied to the provisions at issue:

> In contrast to § 1, the distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions with which we are concerned here, appears to denote only persons or activities within the flow of interstate commerce – the practical, economic continuity in interstate markets and their transport and distribution to the consumer.

Gulf Oil, 419 U.S. at 195.

This Court's decision in *Gulf Oil* hinged on its finding that § 2(a) required that the alleged conduct occur within the flow of interstate commerce, noting the Congressional history of § 2(a), wherein the original provision of § 2(a) contained the following language:

> It shall also be unlawful for any person, whether in commerce or not, either directly or indirectly, to discriminate in price between different purchasers ... where ... such discrimination may substantially lessen competition.

Id. at 199-200. This provision was ultimately deleted from the language of § 2(a), thus supporting the Court's interpretation that the discriminatory conduct of § 2(a) must occur "within the flow of interstate commerce." *Id.*

There is no mention of § 2(c) at all in the *Gulf* Oil decision. The language of § 2(c) does not contain the additional provision -- "where either or any of the purchases involved in such discrimination are in commerce" -- that is found in § 2(a). Under proper statutory construction, it must be presumed that the omission of the additional language set forth in § 2(a) requiring that the discriminatory conduct occur within the flow of commerce from § 2(c) was intentional. As the Ninth Circuit previously held with respect to the broader jurisdictional scope of § 2(c): "The concept to which we refer is something more than the broader test of 'affecting interstate commerce,' which is applied under the Sherman Act." *Rangen*, 351 F.2d at 861.

At least one other district court within the jurisdiction of the Ninth Circuit followed the Ninth Circuit's precedent. *Thurman Industries, Inc. v. Pay'N Pak Stores, Inc.*, 709 F. Supp. 985, 997 (W.D. Wash. 1987) ("The Ninth Circuit cases addressing the jurisdictional reach of § 2(c) indicate that the 'in commerce' requirement of § 2(c) is broader than the 'in

commerce' requirement of § 2(a). Under § 2(c), a violation may occur when an intrastate transaction influences interstate competition.") (citing *Rangen*, 351 F.2d at 861). Also, in addressing § 2(c) in the *May Dep't Store* case, the Ninth Circuit held: "The interstate character of the companies involved may provide a sufficient commerce nexus to meet the jurisdictional requirement [of § 2(c)]." *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980) (citing *Rangen*, 351 F.2d at 861).[5]

The Ninth Circuit's historical rationale in interpreting the jurisdictional reach of § 2(c) of the Robinson-Patman Act in *Rangen* is sound, logical and correct for at least two reasons. First, the clear absence of any language in § 2(c) requiring that the prohibited conduct occur "within the flow of interstate commerce" can only mean that Congress did not intend to limit the scope of § 2(c) in this manner. Second, the type of conduct prohibited by § 2(c) involves illegal commissions, kickbacks, commercial bribes, etc., none of which occur "within the flow of commerce," but all of which may have an adverse effect on commerce.

---

[5] Both the district court and the Ninth Circuit incorrectly assert that the *Gulf Oil* case was not analyzed in the *May Dep't Store* case. In *May Dep't Store*, the Ninth Circuit cited *Gulf Oil* and acknowledged that under *Gulf Oil's* rationale, a party must "plead and prove involvement of interstate commerce" to satisfy subject matter jurisdiction. *May Dep't Store*, 637 F.2d at 1216. However, Three paragraphs later, the Court held that the interstate characteristics of the companies involved might be enough to satisfy the jurisdictional requirement of a § 2(c) claim. *Id.*

Also, the Ninth Circuit's assertion that the discussion of *Moore v. Mead's Fine Bread*, 348 U.S. 115, 75 S. Ct. 148 (1954) in the *Rangen* case somehow shows that the *Rangen* court recognized a "parallel" between § 2(a) and § 2 (c) is inaccurate and contrary to previously well established precedent:

> Section 2(a) deals expressly with discriminatory prices, while section 2(c) prohibits a particular trade practice deemed by Congress to be detrimental to competition. Section 2(c) is to be construed independently without reference to the price discrimination section.

Rangen, 351 F.2d at 857 (citing, *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n*, 106 F.2d 667, 675-677 (3rd Cir. 1939); *Oliver Bros. v. Federal Trade Comm'n*, 102 F.2d 763, 767-768 (4th Cir. 1939); *Biddle Purchasing Co. v. Federal Trade Comm'n*, 96 F.2d 687, 690 (2nd Cir. 1938); *Federal Trade Comm'n v. Henry Broch & Co.*, 363 U.S. 166, 170-171, 80 S. Ct. 1158, 1161 (1960)). Thus, the Ninth Circuit's conclusion that *Gulf Oil* stands for the proposition that the jurisdictional scope of § 2(a) governs all Robinson-Patman Act claims contradicts long-standing precedent that each section of the Robinson-Patman Act is to be construed independently.

Finally, contrary to the Ninth Circuit's assertion, *Gulf Oil* did not give the *Moore* case a more "narrow reading." In *Moore*, the defendant was engaging in only local discriminatory pricing practices, but also engaged in interstate sales. The Court in *Gulf*

Oil expressly found that Meade's "did have interstate sales and its price discrimination thus fell within the literal language of §2(a)" despite the fact that its anticompetitive practices were only local. *Gulf Oil*, 419 U.S. 200-01 n.17. This Court made that finding despite the fact that § 2(a) has the additional requirement that the discriminatory conduct "be within the flow of interstate commerce" that is absent from § 2(c). It is unclear how this Court's explanation of *Moore* in *Gulf Oil* narrows the holding of *Moore*. Irrespective of the Ninth Circuit's flawed rationale, § 2(c) should be interpreted, as it historically has been, as having a broader jurisdictional scope than § 2(a).

However, if the explanation of *Moore* in *Gulf Oil* is the test for the jurisdictional scope in § 2(a) cases and, assuming, *arguendo*, the panel is correct and § 2(a)'s jurisdictional requirements apply to all Robinson-Patman Act claims, those requirements are also satisfied in this case under the rationale of *Moore*. Mitsubishi engaged in conduct that expressly violated the provisions of § 2(c) and Mitsubishi undeniably does otherwise engage in interstate sales. *Gulf Oil*, 419 U.S. 200-01 n.17. For all of the reasons set forth above, the Ninth Circuit's interpretation of *Gulf Oil* merits this Court's review and guidance as to the jurisdictional scope of 15 U.S.C. § 13(c) and to determine whether United States corporations that compete abroad with foreign competitors (assuming proper personal jurisdiction and the requisite contacts) have any recourse under the Robinson-Patman Act against those foreign competitors who engage in illegal practices abroad that directly impact interstate commerce and foreign trade.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

George P. McAndrews
Counsel of Record
Gerald C. Willis
McAndrews, Held & Malloy, Ltd.
500 West Madison Street
Suite 3400
Chicago, Illinois 60661
(312) 775-8000
Attorneys for Petitioner

(Any footnotes trail end of each document)

No. 02-35268

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROTEC INDUSTRIES, INC.,
an Illinois corporation,
Plaintiff-Appellant,

v.

MITSUBISHI CORPORATION, a corporation organized under the laws of Japan; TUCKER ASSOCIATES, INC., an Oregon corporation; GARRY TUCKER, an individual,
Defendants-Appellees.

September 11, 2003, Argued and Submitted,
Portland, Oregon
November 10, 2003, Filed

COUNSEL: George P. McAndrews and Gerald C. Willis, McAndrews, Held & Malloy, Ltd., Chicago, Illinois, for the plaintiff-appellant.

Michael O. Warnecke, Mayer, Brown, Rowe & Maw, Chicago, Illinois, for the defendants-appellees.

JUDGES: Before: Otto R. Skopil, Jr., Cynthia Holcomb Hall, and Susan P. Graber, Circuit Judges. Opinion by Judge Hall.

OPINION BY: Cynthia Holcomb Hall

OPINION: HALL, Circuit Judge:

This controversy arises out of the construction of a massive dam on the Yangtze River by the government of the People's Republic of China. The parties competed for contracts to sell construction equipment to the Chinese government. Rotec Industries, Inc., appeals the district court's order granting summary judgment to defendants on Rotec's claim of violation of section 2(c) of the Robinson-Patman Act and on its Oregon state law claim of intentional interference with economic advantage. Rotec argues that the district court erred by holding that it lacked subject matter jurisdiction over the Robinson-Patman claim. Rotec also assigns error to the district court's ruling that Rotec did not introduce sufficient evidence to create an issue of fact regarding the causation element of Rotec's intentional interference claim.

We have jurisdiction under 28 U.S.C. § 1291. Finding no error in the district court's grant of summary judgment, we AFFIRM.

FACTS

Almost two millennia after Chinese emperors began construction on what would one day be the Great Wall, China's government began construction on another ambitious public works project. Upon completion, the Three Gorges Dam on the Yangtze River will be an extraordinary accomplishment of modern engineering. The project began in 1993 and is being conducted in three phases. When construction ends in 2009, the dam is expected to be the largest hydroelectric dam in the world.

Rotec is a manufacturer of concrete placement equipment. During Stage I of the dam project, the China Yangtze Three Gorges Project Development Corporation ("Three Gorges Corp."), a corporation owned by the Chinese government, bought Rotec equipment for use in the construction of the dam. In 1995, Three Gorges Corp. announced that it would seek bids for contracts to buy concrete placement equipment during Phase II of the project. Rotec sought to win these contracts. In December 1995, Mitsubishi, a Japanese corporation, Potain, a French corporation, and C.S. Johnson, an Illinois corporation (collectively, "the defendants"), agreed they would work together to place a bid to compete with Rotec for these contracts.

On January 15, 1996, seven companies placed bids to win the contracts to provide equipment for the dam. A Bid Evaluation Committee, consisting of approximately sixty members, evaluated the bids and recommended both Rotec and the defendants to Three Gorges Corp. Negotiations then were conducted for several months. In November 1996, Rotec secured a contract to sell three pieces of concrete placement equipment. The buyer was listed as the Chinese Resources National Corporation ("CRNC"). Three Gorges Corp. was listed as the "owner." CRNC contracted to buy the equipment for $ 30,515,319.

CRNC also received an option to purchase two more pieces of equipment from Rotec for $ 15,859,000. Instead of exercising this option, however, CRNC bought the other two pieces of equipment from Mitsubishi for $ 17,825,190 on December 16, 1996. CRNC was named as the buyer and Three Gorges Corp. as the "owner" of this additional equipment. Also

on December 16, 1996, Mitsubishi signed an addendum to its contract with CRNC, agreeing to pay CRNC a 0.5 percent "commission" on the contract to be delivered to a CRNC account in Hong Kong. At some point during the negotiating process, one of the parties involved with Mitsubishi recommended a Bid Evaluation Committee member for a quality control job.

Rotec sued defendants for patent infringement in the Central District of California. The claim was dismissed. Rotec subsequently filed suit against the defendants in the Central District of Illinois, alleging a variety of claims. Approximately five months after the deadline to amend its pleadings, Rotec sought leave to amend to add the claims that are now before us. The district court in Illinois denied Rotec leave to amend but granted a motion for relief from a protective order so that Rotec could bring claims based on certain documents in a different district. In so doing, the district court expressed "no opinion" on the propriety of bringing such claims in any district.

Rotec then filed suit in the District of Oregon, alleging violations of the Robinson-Patman Act, RICO, and Oregon state law prohibiting intentional interference with economic relations. In two separate published orders, the district court granted summary judgment in favor of Mitsubishi on all claims. 181 F. Supp. 2d 1173 (D. Or. 2002); 163 F. Supp. 2d 1268 (D. Or. 2001). This appeal followed.

DISCUSSION

A. Claim Preclusion

Defendants argue that the claims brought by Rotec could have been brought in the federal action in Illinois and are therefore barred by the doctrine of *res judicata* or, more specifically, claim preclusion. We do not consider the argument because it is waived.

"Claim preclusion is an affirmative defense which may be deemed waived if not raised in the pleadings. Moreover, the failure of the defendant to object to the prosecution of dual proceedings while both proceedings are pending also constitutes waiver." *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 328 (9th Cir. 1995) (citation omitted). In district court, the defendants did not object to Rotec's prosecution of the two proceedings that appear to arise out of the same set of operative facts.

Since the defense is not one of jurisdiction, it generally cannot be raised for the first time on appeal. Extraordinary circumstances may justify raising claim preclusion for the first time on appeal. *Cf. Clements*, 69 F.3d at 327-31 (applying issue preclusion for first time on appeal); *Chew v. Gates*, 27 F.3d 1432, 1437 n.2 (9th Cir. 1994) (same). In this case, we see no reason to depart from our general rule that claim preclusion is waived if not raised in district court. There is no reason to allow litigants to delay objecting to dual proceedings until they receive a favorable judgment in one proceeding. We believe that permitting such conduct could only encourage mischief.

We therefore do not consider defendants' argument that Rotec's claims are barred by claim preclusion.

B. Jurisdiction Under Section 2(c) of the Robinson-Patman Act

Section 2(c) of the Robinson-Patman Act n1 states:It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.15 U.S.C. § 13(c).

The district court held that the conduct at issue did not meet the jurisdictional requirements of section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c). The court declined to rely on our decision in *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965), concluding that *Rangen* was no longer good law in light of *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 42 L. Ed. 2d 378, 95 S. Ct. 392 (1974).

Rangen held that a very incidental effect on interstate or foreign commerce was enough to satisfy the jurisdictional requirement of section 2(c). *See Rangen*, 351 F.2d at 861 (stating that payments "were made in the course of interstate commerce because they created

influences intrastate which injured the free competitive interstate commerce in fish food outside Idaho"). In *Gulf Oil*, the Supreme Court interpreted the jurisdictional portion of section 2(a) of the Robinson-Patman Act more narrowly:The distinct "in commerce" language of the . . . Robinson-Patman Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce-- the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anti-competitive acquisitions and activities *affect* commerce.*Gulf Oil*, 419 U.S. at 195.

In *Gulf Oil*, the Supreme Court interpreted section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), not the section applicable to this case, section 2(c), 15 U.S.C. § 13(c). Section 2(a) forbids "any person engaged in commerce, in the course of such commerce" to discriminate in price "where either or any of the purchases involved in such discrimination are in commerce" and where the discrimination has substantial anti-competitive effects "in any line of commerce." 15 U.S.C. § 13(a); *see also Gulf Oil*, 419 U.S. at 193-94. Rotec argues that, because *Gulf Oil* involved section 2(a) while *Rangen* involved section 2(c), the district court should have applied the analysis of *Rangen*. We disagree.

The only relevant differences between the two jurisdictional provisions are section 2(a)'s requirements that "purchases involved in such discrimination" must be "in commerce" and that the price discrimination

must have a substantial effect "in any line of commerce." 15 U.S.C. § 13(a). Nothing in *Gulf Oil*'s analysis, however, was unique to section 2(a). Rather, *Gulf Oil* spoke of the Robinson-Patman Act in its entirety, and since *Gulf Oil*, we have indicated that the Act's jurisdictional provisions are co-extensive in scope. *See Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 881-82 (9th Cir. 1982) (holding that the jurisdictional reach of sections 2(d) and 2(e) is limited to that of 2(a)).

Rangen itself recognized the parallel between section 2(a) and section 2(c). *Rangen* principally relied on *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 99 L. Ed. 145, 75 S. Ct. 148 (1954). *See Rangen*, 351 F.2d at 860-61. *Moore* interpreted section 2(a). We specifically noted this fact in *Rangen*, but applied *Moore* to the jurisdictional analysis under section 2(c). Id.

Moreover, the Supreme Court in *Gulf Oil* gave *Moore* a very narrow reading. It stated that *Moore* was concerned with the scope of Congress's commerce power, but that *Moore* did not squarely address the jurisdictional requirement of section 2(a). Gulf Oil, 419 U.S. at 201. Because *Rangen* relied on a more expansive interpretation of *Moore*, *Gulf Oil* undercuts *Rangen's* analysis of section 2(c) jurisdiction.

More recent Supreme Court authority also casts doubt on the continuing validity of *Rangen*. Most notably, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001), the Supreme Court specifically addressed the meaning of the term "engaged in foreign or interstate commerce," as used in the Federal Arbitration Act. The Court found that the term "engaged in commerce" is a term of art Congress

employs when it does not intend to exercise its full power under the Commerce Clause. Id. at 115. Yet our holding in *Rangen* rested in part on a case interpreting the outer limits of Congress's power under the Commerce Clause. *Rangen*, 351 F.2d at 860-61 (relying on *Moore*, 348 U.S. at 119).

Rotec's argument that we have "reaffirmed" *Rangen*'s jurisdictional analysis is unpersuasive. In *May Department Store v. Graphic Process Co.*, 637 F.2d 1211 (9th Cir. 1980), a party raised the argument for the first time on appeal that a plaintiff's section 2(c) complaint did not properly allege the interstate commerce requirements of section 2(c). The court held that the party should be given a chance to amend its pleadings to properly plead the commerce requirement. In so holding, the court stated that the "interstate character of the companies involved may provide a sufficient commerce nexus to meet the jurisdictional requirement." Id. at 1216 (citing *Rangen*, 351 F.2d at 861). The court did not address the extent to which *Rangen* survives *Gulf Oil*. The precise holding on this issue was merely that a party should be given a chance to amend its pleadings when its jurisdictional statement is insufficient. n2

Rotec does not offer the court any logical reason why the Supreme Court's jurisdictional analysis in *Gulf Oil* and *Circuit City* should not apply to section 2(c) of the Robinson-Patman Act. Accordingly, the jurisdictional analysis of *Rangen* is overruled. n3

We hold that the jurisdictional analysis under section 2(c) of the Robinson-Patman Act is governed by the standard announced by the Supreme Court in *Gulf Oil*.

The reach of section 2(c) extends only to persons and activities which are themselves within the flow of commerce among the states or with foreign nations, but does not extend to all activities which affect such commerce. *See Gulf Oil*, 419 U.S. at 195.

The fact that defendants' $ 17.8 million contract with Three Gorges Corp. included a term that arguably required that about $ 50,000 of tools come from the United States is not relevant to the jurisdictional analysis. Section 2(c) provides that the unlawful payment must occur "in the course of" commerce. 15 U.S.C. § 13(c). The allegedly unlawful payments occurred completely outside the United States between a Japanese corporation, Mitsubishi, and a Chinese corporation, CRNC. The money was to be transferred to a bank in Hong Kong. None of this activity can be considered to have occurred "within the flow of" commerce among the several states or with foreign nations. *Gulf Oil*, 419 U.S. at 195. We therefore affirm the district court's dismissal of the section 2(c) claim for lack of subject matter jurisdiction.

C. Intentional Interference With Economic Relations

In Oregon, the tort of intentional interference with economic relations requires Rotec to prove: "(1) the existence of a professional or business relationship (which could include, *e.g.*, a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third party, (4) accomplished through improper means or for an improper purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages." *McGanty v. Staudenraus*, 321 Ore. 532, 901 P.2d 841,

844 (Or. 1995). The district court assumed for purposes of its decision that all elements other than the causation element were met. It then dismissed the action because Rotec failed to demonstrate causation between the allegedly improper interference and the damage to the economic relationship.

Like the district court, we will assume, for purposes of this opinion, that the improper means was defendants' payment of a 0.5 percent commission to CRNC. We assume, too, that the offer of a quality control job to a member of the Bid Evaluation Committee was improper. Also like the district court, however, we hold that too many inferences need to be drawn to establish a connection between that improper conduct and Rotec's ultimate failure to secure the two contracts won by defendants.

The heart of Rotec's assertions is that Mitsubishi bought off two members of the Evaluation Committee. According to Rotec, this caused the sixty-member Committee to make the recommendation it did. Nevertheless, Rotec has not come forward with any evidence showing that the two members who allegedly were bought off had that kind of influence on the Committee. Moreover, according to Rotec's own brief, the Evaluation Committee recommended *both* Rotec and Mitsubishi. It was then that Three Gorges Corp. began negotiating with the parties. Even if we accept Rotec's assertions that Mitsubishi essentially bought the votes of two members of the Evaluation Committee and that these two members caused the sixty-member Evaluation Committee to act as it did, we still cannot identify a linkage between the Committee's actions and CRNC's decision to execute a contract with defendants.

Rotec has simply not come forward with any facts demonstrating a connection between CRNC's decision not to award the contract to Rotec and the allegedly improper award of a quality control job and a kickback by defendants to CRNC. We therefore affirm the district court's grant of summary judgment on this claim.

CONCLUSION

The district court correctly dismissed the Robinson-Patman claim for lack of jurisdiction. It also correctly held that Rotec did not come forward with sufficient evidence that could lead a rational trier of fact to conclude that defendants' unlawful payment caused defendants to receive the contract from the Chinese government parties.

AFFIRMED.

Footnotes

n1 The Robinson-Patman Act is codified at 15 U.S.C. §§ 13, 13a, 13b and 21a. It was passed in 1936 and is sometimes referred to as the "Robinson-Patman Anti-Discrimination Act" or the "Robinson-Patman Price Discrimination Act." *See* 15 U.S.C. § 13 and accompanying historical and statutory notes.

n2 We disagree with the holding of the district court for the Western District of Washington that the " 'in commerce' requirement of § 2(c) is broader than the 'in commerce' requirement of § 2(a)." *Thurman Indus., Inc. v. Pay'N Pak Stores, Inc.*, 709 F. Supp. 985, 997 (W.D. Wash. 1987). That district court opinion cited

Rangen for this proposition without discussing *Gulf Oil*'s effect on *Rangen*.

n3 A three-judge panel generally has no power to overrule a decision of this court. Such a ruling may be handed down by an en banc panel of this court or the United States Supreme Court (and state high courts on issues of state law). But "we may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point." *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (internal quotation marks omitted). This is such a case.

Civil No. 00-1394-KI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROTEC INDUSTRIES, INC.
an Illinois Corporation,
Plaintiff,

v.

MITSUBISHI CORPORATION, a Corporation organized under the laws of Japan; TUCKER ASSOCIATES, INC., an Oregon Corporation; and GARRY TUCKER, an individual,
Defendants.

September 14, 2001, Decided

COUNSEL: Jeffrey S. Love, Klarquist Sparkman Campbell Leigh & Whinston, LLP, Portland, Oregon, for Plaintiff.

George P. McAndrews, Matthew G. McAndrews, Dean A. Pelletier, James R. Nuttall, McAndrews, Held & Malloy, Ltd., Chicago, Illinois, for Plaintiff.

Paul Fortino, Anne L. Nichol, Perkins Coie LLP, Portland, Oregon, for Defendants.

Michael O. Warnecke, Debra Rae Bernard, Mayer, Brown & Platt, Chicago, Illinois, for Defendants.

JUDGES: GARR M. KING, United States District Judge.

OPINION BY: GARR M. KING

OPINION:

KING, Judge:

This action concerns the Three Gorges Dam project ("Project") on the Yangtze River in China. When completed, the Three Gorges Dam will be the largest hydropower project in the world. It is being built in multiple stages, beginning in 1993 with completion expected in 2009. Stage I of the Project involved excavating and diverting the Yangtze River into a side channel. It was completed in 1997. Stage II involves construction of a large portion of the main section of the dam. It requires the placement of a huge volume of concrete.

Plaintiff Rotec Industries, Inc. ("Rotec"), and defendant Mitsubishi Corporation competed for contracts awarded for the purchase of equipment to place concrete in Stage II of the Project. The equipment contracts were split between the two companies. Rotec's claims concern conduct leading up to the award of these contracts, allegedly including bribery in the form of monetary payments and a job offer made to a man on the Bid Evaluation Committee. Before the court is defendant Mitsubishi Corporation's motion to dismiss and/or for summary judgment (# 23) and Tucker defendants' motion to dismiss and/or for summary judgment (# 27). For the reasons below, I grant summary judgment against the federal statutory claims and deny the motions against the state tort claim.

FACTS

Plaintiff Rotec, based in Illinois, designs, manufactures, sells, leases, and services heavy construction machinery, including the Tower Belt, a crane-based concrete conveyor system. Defendant Mitsubishi Corporation, based in Japan, engages in construction projects but does not design or manufacture equipment. Mitsubishi teamed with CS Johnson, an American company, and Potain, a French company, on the Project. Defendant Garry Tucker is president of defendant Tucker Associates, Inc. (jointly, "Tucker defendants"), an engineering consulting company based in Oregon. Tucker Associates was a consultant to CS Johnson on the Project.

China Yangtze Three Gorges Project Development Corporation ("China Three Gorges Development") is the owner of the Project. China Resources National Corporation and China Resources Machinery Corporation, two separate corporations, are subsidiaries of China Resources (Holdings) Co., Ltd. All of these Chinese entities are owned in whole or in part by the Chinese government.

CS Johnson hired Arvin Yu, a Chinese national, to be its sales agent in China. Yu also traveled with Tucker in China to act as his interpreter. Tucker described Yu as CS Johnson's "eyes and ears in China," providing information on various construction projects that he received from the Chinese government and other sources.

Mitsubishi began pursuing sales at the Project in 1992. It supplied numerous types of construction

equipment in Stage I, including excavators, dump trucks, passenger buses, and a concrete batching plant.

In 1994 during Stage I of the Project, Rotec supplied one Tower Belt and two cranes, as well as trucks, associated equipment, and spare parts.

Also in 1994 during Stage I of the Project, CS Johnson sold a concrete batching plant to the Project. Tucker was consulting for CS Johnson at that time. One of CS Johnson's contacts at China Three Gorges Development for the batching plant was Zhuang Ming Xiang, a member of the Bid Evaluation Committee. The Bid Evaluation Committee, made up of at least 60 people, was responsible for evaluating and comparing the bids for the Project, including the concrete conveyor systems to be purchased in Stage II.

In connection with the Stage I batching plant contract, CS Johnson needed a person to supervise the quality of the steel being fabricated in China. In early 1995, Zhuang Ming Xiang was critical of the CS Johnson design drawings made pursuant to the contract.

On June 8, 1995, Arvin Yu sent a fax to Tucker in which he relays a message from Ruan Guanghua, a senior consultant of China Three Gorges Development and member of the Evaluation Committee, stating:

> I. I am working for review and revising the tendering documents on Proposal Concrete Conveying System and Placement.

> II. In the 3GPC working group, every one knows that C.S. Johnson will co-operate with Potain for now, no bad comment on CSJ but Mr. Zhuang Mingxiang, he complained and made bad words. "CSJ design drawings is delay and could not satisfy requirement, less details."
>
> III. I know that Mr. Zhuang Mingxiang hopes to take fabrication QC, but to quote price and sign official contract with CSJ for him is dangerous. So, he will never quote price directly.
>
> IV. So, I think you should to close Zhuang's mouth with QC job, and the contract or agreement has to be through Third Party. It's safety for Zhuang. The high level leaders are impressed with Zhuang's comment, as he is Machinery Department Manager.

Bernard Decl. Ex. 39 (emphasis in the original) n1. A few weeks later, Tucker, on behalf of CS Johnson, authorized Zhuang Ming Xiang to be its quality control representative on the batching plant contract. Tucker is not sure if the position was compensated or not.

Tucker testified that they offered the CS Johnson quality control job to Zhuang Ming Xiang so that he would stop being critical of CS Johnson. He also maintains that the job offer had nothing to do with the upcoming bids for the Stage II contracts. Rotec alleges that Tucker offered Zhuang Ming Xiang the quality control job as a form of bribery to stop his criticism of

CS Johnson and to influence him as a member of the Evaluation Committee as it was preparing to work on Stage II bids.

In August 1995, China Three Gorges Development announced that it was soliciting bids for the Stage II concrete placement equipment for the Project.

On November 1, 1996, Rotec contracted with China Resources National to sell it three Tower Belts, two cranes, and associated equipment and services for a total contract price of $ 30,515,319.

In a contract dated December 16, 1996, Mitsubishi, as the Seller, contracted with China Resources National, the Buyer, to sell two Top Belt systems, designed and manufactured by Potain and CS Johnson. The Top Belt equipment was to be manufactured in France, Japan, and China. The Top Belt system consisted of a Top Belt Conveyor provided by CS Johnson and a Tower Crane provided by Potain. The contract price, including associated equipment and services, was $ 17,825,190. An Appendix to the December 1996 contract contains a table of tools needed for dismantling, assembling, and maintenance. The list consists mostly of hand tools such as hammers and wrenches for a total FOB price of $ 51,608.36, to be supplied by CS Johnson. The table has column headings of "Unit Price FOB USA" and "Ext Price FOB USA." Tucker testified that the Chinese demanded that the tools come from the United States.

Also on December 16, 1996, Mitsubishi executed an addendum requiring it to pay 0.5% of the contract price, or $ 89,126, to China Resources National. The

addendum requires the commission to be paid to the buyer's account in a bank in Hong Kong with an account name of China Resources Machinery. Wu Jun executed the addendum on behalf of China Resources National. Payment is not due until seven days after Mitsubishi's receipt of payment from China Resources National. There is no evidence that Mitsubishi has been paid in full yet or that Mitsubishi paid the 0.5% commission payment yet. Shigeo Mizutani, the person in charge of Mitsubishi's Stage II construction efforts at the Project, executed the addendum on behalf of Mitsubishi. He testified that the commission was payment for China Resources National's services as a payment agent for China Three Gorges Development.

Tucker testified that there was talk of payment in the nature of bribes made by Arvin Yu but that he does not know of any payments made to anybody. He and the CS Johnson president told Arvin Yu that they would not be privy to any knowledge about what was going on after they sold equipment to Arvin Yu. He also testified:

> V. Q. Did you state that you knew that Yu made payments to government officials for the batch plants?
>
> VI. A. Mr. Yu made payments to people. I do not know who they were.
>
> VII. Q. How do you know he made payments to people?
>
> VIII. A. Supposition on my part.
>
> IX. Q. Based on what?

X. A. I could not recollect at this time.

XI. Q. Is it fair to say that you knew that Mr. Yu was what we term a bag man for payments to Chinese officials?

XII.MR. WARNECKE: Objection.

XIII. THE WITNESS: Never heard him called that before.

XIV. BY MR. McANDREWS: (continuing)

XV.Q. No. Well, you said you made a supposition. Did you suppose that Mr. Yu was making payments to friends on the evaluation committees?

XVI. A. I had reason to believe that there was money that was being passed around to various people.

Tucker Depo. at 155-56.

CS Johnson went bankrupt in 1997 and ceased operations. It was replaced by a Japanese conveyor manufacturer prior to the manufacture of the two Top Belt systems sold by Mitsubishi to China Resources National.

LEGAL STANDARDS

After a discussion with the attorneys at the oral argument, I informed them that I would treat the

motions against all claims as motions for summary judgment.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. Robi v. Reed, 173 F.3d 736, 739 (9th Cir.), cert. denied, 528 U.S. 952, 145 L. Ed. 2d 293, 120 S. Ct. 375 (1999).

DISCUSSION

I. Robinson-Patman Act

Section 2(c) of the Robinson-Patman Act states:

> XVII. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance of discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to

> such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 13(c).

Rotec alleges that the 0.5% commission Mitsubishi agreed to pay comprises a commercial bribe or an illegal brokerage in violation of § 2(c) of the Robinson-Patman Act.

Mitsubishi contends the commission was a negotiated price reduction. It argues that the Robinson-Patman § 2(c) claim fails for several reasons: (1) none of the conduct occurred in the course of commerce so there is no subject matter jurisdiction; (2) none of the acts constitute commercial bribery as prohibited by the Act; (3) no payment was ever made; (4) the transaction was not in connection with the sale or purchase of goods; and (5) payment was made to the buyer rather than an agent.

A. Abandoned Claims

Rotec confirmed that it has abandoned the following claims, which are all dismissed.

Under the Robinson-Patman Act: (1) Mitsubishi's overt expression of willingness to pay a commission to China National Machinery; (2) Mitsubishi's overt expression of willingness to enter into an illegal joint

venture with China Resources Machinery; (3) Tucker's award of a quality control position to Zhuang Ming Ziang; and (4) Tucker's knowledge of Arvin Yu's payments to various people in China. Thus, no Robinson-Patman Act claims remain against the Tucker defendants. The single Robinson-Patman Act claim against Mitsubishi concerns the 0.5% commission Mitsubishi agreed to pay.

B. Engaged in Commerce

Mitsubishi contends that the conduct at issue all occurred in China and took place between a Japanese company and a Chinese company. Thus, it contends that none of the allegedly unlawful activity occurred in the course of commerce as defined in the Act. Mitsubishi argues that an effect on commerce is not sufficient to invoke jurisdiction under the Robinson-Patman Act, even though it is sufficient under other antitrust acts, such as the Sherman Act. It contends that to meet the jurisdictional prerequisite in the Robinson-Patman Act, defendants must be engaged in commerce with respect to the particular conduct alleged to violate the Act and the conduct must occur in the course of that commerce.

Rotec contends that § 2(c) is interpreted more broadly than § 2(a), from which defendants draw parallels. Because of the differences in the two sections of the statute, Rotec notes that courts have applied § 2(c) and held that wrongful conduct satisfies its "course of commerce" requirement, even if the conduct itself does not constitute a transaction in commerce as defined by the Act. Influence on such interstate commerce can be sufficient to establish jurisdiction. Moreover, Rotec identifies in Mitsubishi's contract 58

categories of goods to be shipped from the United States to China.

Mitsubishi replies that the American goods are $ 51,608 n2 of hand tools such as hammers which were never supplied because CS Johnson went bankrupt shortly after the contract was executed. The tools were ultimately supplied by a Japanese company. Mitsubishi also notes that the hand tools, from CS Johnson, were not mentioned in the addendum which obligated Mitsubishi to pay the 0.5% commission to China Resources National. It contends that the hand tools have no relevance to whether the allegedly unlawful activity itself, the 0.5% commission payment from Mitsubishi, occurred in the course of commerce as defined by the Act. They also argue that the cases relied upon by Rotec have limited validity in light of more recent Supreme Court cases, specifically Rotec's argument that an influence on commerce is sufficient.

The jurisdictional analysis is based on the phrase in the Act regulating certain conduct of "any person engaged in commerce, in the course of such commerce." I proceed with the analysis in light of the Supreme Court's recent comment that the phrase "engaged in commerce" is "a term of art indicating a limited assertion of federal jurisdiction." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 1309, 149 L. Ed. 2d 234 (2001) (interpreting the Federal Arbitration Act, quoting United States v. American Building Maintenance Industries, 422 U.S. 271, 279-80, 95 S. Ct. 2150, 45 L. Ed. 2d 177 (1975)).

The Robinson-Patman Act uses the definition of commerce found in the Clayton Act: "trade or

commerce among the several States and with foreign nations n3 ...." 15 U.S.C. § 12(a).

Here, the commission was to take place between two foreign companies, was negotiated overseas, was executed overseas, and was to be paid overseas. The concrete conveyor systems were manufactured overseas and installed overseas. The only direct tie to commerce with the United States are the hand tools specified in the addendum. The Ninth Circuit recognizes a *de minimis* exception to jurisdiction under the Robinson-Patman Act. Interstate sales which are merely "inadvertent or incidental to a pattern of intrastate sales might justify application of a *de minimis* rule." Zoslaw v. MCA Distributing Corporation, 693 F.2d 870, 880 (9th Cir. 1982) (omitting internal quotation), cert. denied, 460 U.S. 1085, 76 L. Ed. 2d 349, 103 S. Ct. 1777 (1983). The court held that drop sales justified application of *de minimis* principles due to their relative size and sporadic nature, making them appear as an anomaly in the normal distribution pattern. 693 F.2d at 881. Rotec relies on De Modena v. Kaiser Foundation Health Plan, Inc., 743 F.2d 1388 (9th Cir. 1984), cert. denied, 469 U.S. 1229, 84 L. Ed. 2d 368, 105 S. Ct. 1230 (1985), which states that the term "de minimis generally refers to the effect of a violation, not to the proportion of a party's conduct which violates the law as compared to that which does not." Id. at 1394. I see no reason to distinguish between intrastate sales and foreign sales. If anything, the argument to apply a *de minimis* standard is stronger for foreign sales.

I do not interpret the "FOB USA" table headings in the addendum to be a contractual obligation that the hand tools be manufactured in the United States. I

interpret it only as a price term. The contract contains a merger clause in P 3, page 5. Thus, Tucker's testimony that the Chinese demanded the hand tools be American is of no consequence. There is no evidence that the award of the contract was affected in any way by the expectation that hand tools be provided from the United States. Importantly, the hand tools were ultimately provided from Japan.

I conclude that the hand tools were only incidental to the otherwise completely overseas sale. *De minimis* principles are appropriately applied. I will not consider the hand tools when determining if the court has jurisdiction under the Robinson-Patman Act.

Rotec's jurisdictional analysis relies on Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936, 15 L. Ed. 2d 853, 86 S. Ct. 1067 (1966). Both Nelson and its competitor, Rangen, were engaged in the sale of fish food in several states. Nelson alleged that Rangen violated § 2(c) of the Robinson-Patman Act by bribing the superintendent of an Idaho fish hatchery, the person responsible for the nutritional value of fish food used by the State. In exchange, the superintendent would use his best efforts to steer Idaho's fish food business to Rangen. Rangen prepared its fish supplement sold to Idaho at its plants in Idaho, added other components at its plant in Idaho, and delivered it to a fish hatchery in Idaho. No sale to the State crossed state lines, the fish food was consumed within Idaho, and Rangen was paid by check from the state capital at Boise. 351 F.2d at 860. The court reasoned that Rangen was better able to compete in its interstate business because it received an unfair preference in the intrastate Idaho business.

This advantage in its own interstate dealings was critical to the court's holding that the Robinson-Patman Act applied. Id. at 861.

Mitsubishi argues that Gulf Oil Corporation v. Copp Paving Company, Inc., 419 U.S. 186, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974), removed all precedential value from Rangen. Gulf Oil concerns a California "hot plant" which makes asphaltic concrete for surfacing highways. The product cannot be sold profitably more than 35 miles from its manufacturing plant due to its weight and temperature requirements. Plaintiff sued its competitor, alleging a price discrimination violation of § 2(a) of the Robinson-Patman Act, among other antitrust claims. Section 2(a) forbids

> XVIII. "any person engaged in commerce, in the course of such commerce" to discriminate in price "where either or any of the purchases involved in such discrimination are in commerce" and where the discrimination has substantial anticompetitive effects "in any line of commerce."

15 U.S.C. § 2(a); Id. at 194. The Court reversed the Circuit court's holding that the jurisdictional requirements were satisfied by the fact that the intrastate sales of asphaltic concrete were made for use in the construction of interstate highways.

Defendant oil companies engaged in interstate sales. They sold the liquid asphalt to their subsidiaries who manufacture the asphaltic concrete. The subsidiaries own the manufacturing hot plants in several states. The

sales at issue all took place in southern California, meaning that the asphaltic concrete was manufactured, sold, and delivered within California. Id. at 189-90.

The Court reasoned:

> XIX. In contrast to [the Sherman Act], the distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce -- the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities affect commerce.

Id. at 195.

Consequently, the Court held that plaintiff's claims must fail unless it appears that the subsidiary's discriminatory sales occur in the course of its interstate activities. Id. The use of the product in an interstate highway, an instrumentality of interstate commerce, was not interstate activities on the part of the manufacturer and thus insufficient to confer jurisdiction. The Court held that the intrastate sales of asphaltic concrete to interstate highway contractors are not sales "in commerce" as a matter of law within the jurisdictional ambit of § 2(a). Id. at 199.

I recognize that the jurisdictional language in § 2(a) has an additional limitation not found in § 2(c) that the sales at issue must also be in commerce. Gulf Oil does not base its analysis on this additional language, however. I conclude that its analysis applies with equal force to § 2(c).

Rotec contends that Rangen is still good law. It points to a Ninth Circuit case, citing Gulf Oil for a different point of law, which cites Rangen's test concerning the interstate character of the companies. May Department Store v. Graphic Process Company, 637 F.2d 1211 (9th Cir. 1980). The court was analyzing whether to grant plaintiff a chance to replead its admittedly conclusionary and insufficient federal jurisdictional facts in a § 2(c) case. The court stated:

> XX.The interstate character of the companies involved may provide a sufficient commerce nexus to meet the jurisdictional requirement. [citing Rangen] Since it is not clear that the deficiency cannot be overcome by amendment, we remand with instructions that May be allowed to amend its complaint to attempt to properly allege the interstate commerce requirement of [§ 2(C)].

Id. at 1216. There is no analysis of the effect of Gulf Oil on Rangen. Gulf Oil clearly disavows an "affect on commerce" test. I find that if squarely faced with the issue, the Circuit would agree that Rangen is no longer good law.

In summary, "American antitrust laws do not regulate the competitive conditions of other nations' economies." Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 582, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Summary judgment is granted against all Robinson- Patman Act claims.

II. RICO

Rotec alleges that Tucker violated the Foreign Corrupt Practices Act ("FCPA") n4, 15 U.S.C. § 78dd-2, by conduct constituting racketeering activity as prohibited by the Racketeering Influenced Corruption Organizations Act ("RICO"), 18 U.S.C. § 1962(c). It alleges that Mitsubishi conspired to violate RICO in violation of § 1962(d).

RICO prohibits the following:

> XXI. (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> XXII. (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(d), (d).

A violation under § 1962(c) requires proof of: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. Howard v. America Online, Inc., 208 F.3d 741, 746 (9th Cir.), cert. denied, 531 U.S. 828, 148 L. Ed. 2d 40, 121 S. Ct. 77 (2000).

A. Predicate Acts

Rotec relies on the following predicate acts: (1) Tucker's award of a quality control position to Zhuang Ming Xiang; and (2) Tucker's knowledge of Arvin Yu's payments to people. It alleges that both acts violate the FCPA.

Predicate acts must be conduct which is indictable. Howard v. America Online, Inc., 208 F.3d 741, 748 (9th Cir.), cert. denied, 531 U.S. 828, 148 L. Ed. 2d 40, 121 S. Ct. 77 (2000); § 1961(1). Defendants agree that a violation of the FCPA is within the scope of RICO predicate acts.

The FCPA states:

> XXIII. It shall be unlawful for any domestic concern, [other than an issuer], [or for an agent of a domestic concern] to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to --

> XXIV. (1) any foreign official for purposes of --
>
> XXV. (A)(i) influencing any act or decision of the foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the unlawful duty of such official, or (iii) securing any improper advantage; or
>
> XXVI. (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
>
> XXVII.in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

15 U.S.C. § 78dd-2(a).

i. Quality Control Position

Defendants contend that Rotec has no evidence to establish that the award of the quality control position to Zhuang Ming Xiang violates the FCPA. Defendants note that there is no evidence that Zhuang Ming Xiang was ever paid for the position and no evidence that the position, for Stage I work, was intended to influence contracts awarded for Stage II.

Although I agree that the evidence is thin, I conclude that Rotec has raised a factual issue that the

quality control position awarded to Zhuang Ming Xiang violates the FCPA, giving the benefit of all inferences to Rotec. A jury could find that Tucker, the agent of a domestic concern, used a fax, an instrument of interstate commerce, corruptly to further the giving of something of value, the quality control position, to Zhuang Ming Xiang, arguably a foreign official because of the government involvement in China Three Gorges Development, to influence his future decisions and comments as part of the Evaluation Committee. Thus, this will count as one predicate act.

ii. Arvin Yu's Payments

Defendants contend that Rotec has not come forward with evidence to establish that Tucker's knowledge of Arvin Yu's payments "to various people in China" violate the FCPA, in particular: (1) Tucker's specific knowledge or involvement in Yu's alleged payments; (2) who the payments were made to; (3) the purpose of the payments; and (4) when the payments were made.

I agree with defendants that there is insufficient evidence to consider any payments by Arvin Yu to be a violation of the FCPA. Tucker has no knowledge of specific payments. There is no evidence that payments were made to foreign officials. There is no evidence of use of the mails or another instrumentality of interstate commerce to make the payments. His knowledge is based on rumor. Rumor would not support an indictment. Consequently, I do not consider the possible payments by Arvin Yu to be a predicate act.

B. Pattern of Racketeering Activity

A pattern is at least two acts of racketeering activity within ten years of each other. Howard v. America Online, Inc., 208 F.3d 741, 746 (9th Cir.), cert. denied, 531 U.S. 828, 148 L. Ed. 2d 40, 121 S. Ct. 77 (2000); 18 U.S.C. § 1961(5). Although two acts are necessary, they are not sufficient to find a violation. A pattern requires a showing of a relationship between the predicates and of the threat of continuing activity. Id. at 746.

Here, only one predicate act remains. By definition, it cannot establish a pattern of racketeering activity.

C. Enterprise

Defendants contend that Rotec has not come forward with evidence to establish the necessary elements of a RICO enterprise, specifically: (1) whether the enterprise is formal or informal; (2) the decision-making structure; and (3) how each defendant participated in the enterprise.

An enterprise under RICO includes groups with a formal legal structure and groups whose members merely associate in fact. Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1083 (9th Cir.), amended on other grounds, 234 F.3d 428 (2000), cert. denied, 121 S. Ct. 843 (2001). A group cannot be an enterprise, however, unless it exists independently from the racketeering activity in which it engages. It must have some sort of structure for making decisions and mechanisms for controlling and directing the affairs of

the group on an on-going basis rather than an ad hoc basis. A conspiracy is not a RICO enterprise. Id.

Rotec contends that the enterprise consists of Mitsubishi, the Tucker defendants, CS Johnson, Potain, Arvin Yu, and possibly others, beginning in April 1995 when CS Johnson and Potain agreed to pursue aggressively a contract for concrete placement in Stage II of the Project. There is no evidence, however, of the decision-making structure of the enterprise. At best, we have a list of actions taken by members of the enterprise. It is not clear that the group operated jointly when performing the allegedly illegal actions. I conclude that Rotec has failed to raise a factual issue that a RICO enterprise was involved.

D. Summary of § 1962(c) Claim

Summary judgment is granted against the § 1962(c) RICO claim for failure to establish a pattern of racketeering activity and failure to establish an enterprise.

E. RICO Conspiracy Claim

The RICO conspiracy claim against Mitsubishi relies on the RICO claim against Tucker. "To establish a violation of section 1962(d) [conspiracy], Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." Howard v. America Online, Inc., 208 F.3d 741, 751 (9th Cir. 2000). Because the substantive RICO claim against Tucker failed to survive summary

judgment, I also grant summary judgment against the conspiracy claim.

III. State Tort Claim

Rotec alleges a claim for tortious interference with prospective economic advantage under both Oregon and Illinois law. It contends that the improper motive or improper means element of the tort is met by defendants' violations of the Robinson-Patman Act, violations of RICO, or common law bribery.

The parties devoted their main efforts to extensive briefing of the federal statutory claims. They also relied on the assumption that if the federal claims failed, the state tort would also fail, and may not have raised all possible arguments against the tort. On the record before me, it is unclear whether to apply Oregon or Illinois law. I will assume Oregon law is applicable without deciding the issue at this point.

The elements of the tort of intentional interference with economic relations are: (1) the existence of a professional or business relationship; (2) intentional interference with the relationship; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and damage to the economic relationship; and (6) damages. McGanty v. Staudenraus, 321 Ore. 532, 535, 901 P.2d 841 (1995).

I conclude that Rotec has raised a factual issue that it can prove all of these elements. In particular, the improper means could be satisfied by the single predicate act under the RICO analysis, the quality

control job offer. Summary judgment is denied against this claim.

CONCLUSION

Defendant Mitsubishi Corporation's motion to dismiss and/or for summary judgment (# 23) is granted in part. Tucker defendants' motion to dismiss and/or for summary judgment (# 27) is granted in part. The intentional interference with prospective economic advantage claim remains for trial against all defendants.

Dated this 14th day of September, 2001.

/s/

GARR M. KING

United States District Judge

Footnotes

n1 I conclude that the fax is not inadmissible hearsay when offered to prove Tucker's state of mind prior to making the job offer.

n2 Plus $ 3,000 for shipping costs.

n3 The rest of the definition, concerning the District of Columbia and territories and possessions of the United States, is not implicated here.

n4 Rotec also alleges that Tucker violated the Travel Act with the same predicate acts but agreed at oral argument that an analysis under the Travel Act adds nothing. Thus, I will not consider that statute

Civil No. 00-1394-KI

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

ROTEC INDUSTRIES, INC., an Illinois Corporation, Plaintiff,

v.

MITSUBISHI CORPORATION, a Corporation organized under the laws of Japan; TUCKER ASSOCIATES, INC., an Oregon Corporation; and GARRY TUCKER, an individual, Defendants.

February 1, 2002, Decided

COUNSEL: Jeffrey S. Love, Klarquist Sparkman Campbell Leigh & Whinston, LLP, Portland, Oregon, for Plaintiff.

George P. McAndrews, Matthew G. McAndrews, Dean A. Pelletier, James R. Nuttall, Gerald C. Willis, McAndrews Held & Malloy, LTD., Chicago, Illinois, for Plaintiff.

Paul T. Fortino, Anne L. Nichol, Perkins Coie, LLP, Portland, Oregon, for Defendants.

Michael O. Warnecke, Debra Rae Bernard, Mayer Brown & Platt, Chicago, IL, for Defendants.

JUDGES: GARR M. KING, United States District Court Judge.

OPINION BY: GARR M. KING

OPINION:

KING, Judge:

This action concerns the Three Gorges Dam project ("Project") on the Yangtze River in China. When completed, the Three Gorges Dam will be the largest hydropower project in the world. It is being built in multiple stages, beginning in 1993 with completion expected in 2009. Stage I of the Project involved excavating and diverting the Yangtze River into a side channel. It was completed in 1997. Stage II involves construction of a large portion of the main section of the dam. It requires the placement of a huge volume of concrete.

Plaintiff Rotec Industries, Inc. ("Rotec"), and defendant Mitsubishi Corporation competed for contracts awarded for the purchase of equipment to place concrete in Stage II of the Project. The equipment contracts were split between the two companies. Rotec's claims concern conduct leading up to the award of these contracts, allegedly including bribery in the form of monetary payments and a job offer made to a man on the Bid Evaluation Committee.

On September 14, 2001, I granted summary judgment against Rotec's RICO and Robinson-Patman Act claims and denied summary judgment against the claim for tortious interference with prospective economic advantage. I stated:

> The parties devoted their main efforts to extensive briefing of the federal statutory claims. They also relied on the assumption that if the federal claims failed, the state tort would also fail, and may not have raised all possible arguments against the tort.
>
> . . .
>
> I conclude that Rotec has raised a factual issue that it can prove all of these elements. In particular, the improper means could be satisfied by the single predicate act under the RICO analysis, the quality control job offer.

In a telephone conference, I invited defendants to file a second motion for summary judgment against the remaining claim, supported by more complete briefing. Although Rotec contends that the law of the case doctrine precludes me from taking a second look at the claim, I do not feel so constrained due to the lack of argument from any of the parties at the time of the original motion.

Before the court is defendants' motion for summary judgment on plaintiff's tortious interference with prospective economic advantage claim (# 71). For the reasons below, I grant summary judgment against the claim.

FACTS

Many of these facts are taken from the evidentiary record filed with the original motion for summary judgment.

Plaintiff Rotec, based in Illinois, designs, manufactures, sells, leases, and services heavy construction machinery, including the Tower Belt, a crane-based concrete conveyor system. Defendant Mitsubishi Corporation, based in Japan, engages in construction projects but does not design or manufacture equipment. Mitsubishi teamed with CS Johnson, an American company, and Potain, a French company, on the Project. Defendant Garry Tucker is president of defendant Tucker Associates, Inc. (jointly, "Tucker defendants"), an engineering consulting company based in Oregon. Tucker Associates was a consultant to CS Johnson on the Project.

China Yangtze Three Gorges Project Development Corporation ("China Three Gorges Development") is the owner of the Project. China Resources National Corporation and China Resources Machinery Corporation, two separate corporations, are subsidiaries of China Resources (Holdings) Co., Ltd. All of these Chinese entities are owned in whole or in part by the Chinese government.

CS Johnson hired Arvin Yu, a Chinese national, to be its sales agent in China. Yu also traveled with Tucker in China to act as his interpreter. Tucker described Yu as CS Johnson's "eyes and ears in China," providing information on various construction projects

that he received from the Chinese government and other sources.

Mitsubishi began pursuing sales at the Project in 1992. It supplied numerous types of construction equipment in Stage I, including excavators, dump trucks, passenger buses, and a concrete batching plant.

In 1994 during Stage I of the Project, Rotec supplied one Tower Belt and two cranes, as well as trucks, associated equipment, and spare parts.

Also in 1994 during Stage I of the Project, CS Johnson sold a concrete batching plant to the Project. Tucker was consulting for CS Johnson at that time. One of CS Johnson's contacts at China Three Gorges Development for the batching plant was Zhuang Ming Xiang, a member of the Bid Evaluation Committee. The Bid Evaluation Committee, made up of at least 60 people, was responsible for evaluating and comparing the bids for the Project, including the concrete convey or systems to be purchased in Stage II.

In connection with the Stage I batching plant contract, CS Johnson needed a person to supervise the quality of the steel being fabricated in China. In early 1995, Zhuang Ming Xiang was critical of the CS Johnson design drawings made pursuant to the contract.

On June 8, 1995, Arvin Yu sent a fax to Tucker in which he relays a message from Ruan Guanghua, a senior consultant of China Three Gorges Development and member of the Bid Evaluation Committee, stating:

I am working for review and revising the tendering documents on Proposal Concrete Conveying System and Placement.

In the 3GPC working group, every one knows that C.S. Johnson will co-operate with Potain for now, no bad comment on CSJ but Mr. Zhuang Mingxiang, he complained and made bad words. "CSJ design drawings is delay and could not satisfy requirement, less details."

I know that Mr. Zhuang Mingxiang hopes to take fabrication QC, but to quote price and sign official contract with CSJ for him is dangerous. So, he will never quote price directly.

So, I think you should to close Zhuang's mouth with QC job, and the contract or agreement has to be through Third Party. It's safety for Zhuang. The high level leaders are impressed with Zhuang's comment, as he is Machinery Department Manager.

Bernard Decl. Ex. 39 (emphasis in the original) n1. A few weeks later, Tucker, on behalf of CS Johnson, authorized Zhuang Ming Xiang to be its quality control representative on the batching plant contract.

Tucker testified they offered the CS Johnson quality control job to Zhuang Ming Xiang so that Zhuang Ming would stop being critical of CS Johnson. He also

maintains that the job offer had nothing to do with the upcoming bids for the Stage II contracts.

Allen Seeland, former president of CS Johnson, stated in a declaration that CS Johnson understood at the time that offering the job would gain Zhuang Ming's support in the bidding negotiations on Stage II concrete construction, quite his criticism of CS Johnson's drawings for fabrication of the batch plant, and keep him from making negative comments about CS Johnson during contract negotiations for Stage II concrete construction. When asked about his declaration in a deposition, Seeland stated that he wanted to keep Zhuang Ming's "mouth shut" about the drawings but he did not think he could assist CS Johnson get a contract in Stage II.

In August 1995, China Three Gorges Development announced that it was soliciting bids for the Stage II concrete placement equipment for the Project.

Both Rotec and Mitsubishi submitted bids including schedules of proposed prices for the purchase of any quantity between one and seven units, with the price per unit decreasing as the number of units increases (a typical quantity discount).

On November 1, 1996, Rotec contracted with China Resources National to sell it three Tower Belts, two cranes, and associated equipment and services for a total contract price of $ 30,515,319.

In a contract dated December 16, 1996, Mitsubishi contracted with China Resources National to sell it two Top Belt systems, designed and manufactured by

Potain and CS Johnson. The contract price, including associated equipment and services, was $ 17,825,190.

Also on December 16, 1996, Mitsubishi executed an addendum requiring it to pay 0.5% of the contract price, or $ 89,126, to China Resources National. The addendum requires the commission to be paid to the buyer's account in a bank in Hong Kong with an account name of China Resources Machinery. Shigeo Mizutani, the person in charge of Mitsubishi's Stage II construction efforts at the Project, executed the addendum on behalf of Mitsubishi. He testified that the commission was payment for China Resources National's services as a payment agent for China Three Gorges Development.

Tucker testified that there was talk of payment in the nature of bribes made by Arvin Yu but that he does not know of any payments made to anybody. He and Seeland told Arvin Yu that they would not be privy to any knowledge about what was going on after they sold equipment to Arvin Yu. He also testified:

On March 25, 1997, He Gong, a vice president of China Three Gorges Development, sent a letter to Alan Turley, the commercial attache of the United States Embassy in Beijing, China, in response to a letter the Embassy sent on Rotec's behalf concerning intellectual property rights. He Gong states (quoted verbatim):

> 1. The constructive plan for Lot 2 is a comprehensive plan which requires that different types of concrete placement equipment and various constructive methods should be envolved in Stage

Two, including ROTEC equipments. So what Mr. Oury told you that we planned to use his equipments to pour all concrete of this Lot is not correct.

2. ROTEC equipments are good for certain sections of 3G dam, but they are not exclusive. Therefore after inviting bids worldwide and contract negotiations, we have chosen part of ROTEC equipments. We've also selected various types of equipments from other companies including some Chinese companies. Before that we purchased an equipment from ROTEC for test. Test result shows that this equipment has advantages and disadvantages. Especially ROTEC is an associative small enterprise and its equipments come out from combination of products made by different other companies. This explains that ROTEC equipments are expensive and that coordination between parts is poor, which has brought about many difficulties in erection and operation management. We have informed ROTEC of the problems above and expressed our wish that improvements should be made in the second phase contract and better equipments should be supplied. Of course we also wish that ROTEC will develop and prosper by its good reputation and good quality of equipments.

Bernard Supplemental Decl., Ex. 2 at 4-5.

LEGAL STANDARDS

After a discussion with the attorneys at the oral argument, I informed them that I would treat the motions against all claims as motions for summary judgment.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. Robi v. Reed, 173 F.3d 736, 739 (9th Cir.), cert. denied, 528 U.S. 952, 145 L. Ed. 2d 293, 120 S. Ct. 375 (1999).

DISCUSSION

I. Choice of Law

Although arguments could be made that either Oregon, Illinois, or Chinese law applies to the remaining tort, none of the parties have done a choice of law analysis. Defendants believe that Chinese law applies and that none of their conduct violates Chinese law. To spare everyone from the more complicated analysis, however, defendants rely on Oregon law,

under which Rotec's claim also fails, in defendants' opinion. Defendants contend that both Oregon and Illinois law are consistent on the points on which they base their arguments and cite cases from both jurisdictions. Rotec contends that its claim survives summary judgment under either Illinois or Oregon law. It does not address the possibility of applying Chinese law.

I would prefer to resolve this question prior to deciding whether claims should be dismissed. Because Rotec does not argue for applying Chinese law, however, and I know of no relevant differences between Oregon and Illinois law, I will do the analysis under Oregon law.

II. Tortious Interference with Prospective Economic Advantage

The elements of the tort of intentional interference with economic relations are: (1) the existence of a professional or business relationship, which could be a contract or a prospective economic advantage; (2) intentional interference with the relationship; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and damage to the economic relationship; and (6) damages. McGanty v. Staudenraus, 321 Ore. 532, 535, 901 P.2d 841 (1995).

I will assume without deciding that Rotec could survive summary judgment on all of the elements except for the fifth, a causal effect between the interference and damage to the economic relationship. I will also assume that the improper means include at

least the 0.5% commission payment and the quality control job.

Rotec argues causation based on the following evidence. China Resources National planned to buy five concrete conveyor systems. Only Rotec and defendants were bidding on that type of equipment. Prior to the concrete conveyor systems used during Stage II at the Project, Rotec was the only company in the world to have designed, manufactured, or sold that type of equipment. China Resources National purchased three of the units from Rotec and received an option to purchase the other two units from Rotec at a discount. The additional two units were purchased from defendants six weeks later. Based on this, Rotec contends that it has raised a factual issue that defendants' wrongful conduct influenced the purchase decision.

There is no evidence of how defendants' allegedly wrongful conduct affected China Resources National's purchase decisions. Backing up a few steps, there is no evidence of how the conduct affected the Bid Evaluation Committee, no evidence of what the Bid Evaluation Committee recommended, no evidence on who made the final decision, and no evidence on whether the final decision maker accepted the recommendation of the Bid Evaluation Committee. The required inference is too great to make.

Rotec relies on Kalgaard v. Lindo Mar Adventure Club, Ltd., 147 Ore. App. 61, 934 P.2d 637 (1997), and its statement that summary judgment is inappropriate if there are facts creating a plausible inference that a person's statements about his or her conduct are not

true. Id. at 67. A person negotiating to buy a time-share resort ended negotiations after several conversations with one of the time-share members who was critical of the resort managers. The prospective purchaser stated that the member played no role in his rejection of the offer and that he relied on advice from his attorney and his wife. I distinguish Kalgaard from this action by the difference in how far the parties in the two cases had proceeded in their negotiations. In Kalgaard, the seller and purchaser had reached a tentative agreement and final papers were being drafted. In contrast, Rotec was nowhere near that far along in selling the additional units. Instead, it submitted bid prices for additional units, as all prospective bidders were instructed to do, and granted a 90-day option for an additional two units when it contracted for the sale of three units.

Rotec objects to the admission of the He Gong letter, contending that it is hearsay, written after the fact in response to potential patent litigation, and inconsistent with China Three Gorges Development's actions. I believe the reason He Gong sent the letter, namely a reason unconnected to this litigation, bolsters the believability of the letter. It is only inconsistent with China Three Gorges Development's purchases if vendor decisions are made solely on price, which they are not. Concerning the hearsay objection, I conclude that the letter is sufficiently trustworthy to fall within the residual hearsay exception in Fed. R. Evid. 807. I also note that I do not base my analysis on this letter but view it more in the nature of corroboration of the lack of causation evidence.

Summary judgment is granted against the tortious interference with prospective economic advantage claim alleged against all defendants.

CONCLUSION

Defendants' motion for summary judgment on plaintiff's tortious interference with prospective economic advantage claim (# 71) is granted. This action is dismissed with prejudice.

DATED this 1st day of February, 2002.

/s/

GARR M. KING

United States District Court Judge

JUDGMENT

KING, Judge:

Based on the record,

IT IS ORDERED AND ADJUDGED that this action is dismissed with prejudice.

DATED this 1st day of February, 2002.

/s/

GARR M. KING

United States District Court Judge

Footnotes

n1 I concluded previously that the fax is not inadmissible hearsay when offered to prove Tucker's state of mind prior to making the job offer.

No. 02-35268

D.C. No. CV-00-01394-KI
District of Oregon, Portland

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROTEC INDUSTRIES, INC.,
an Illinois corporation,
Plaintiff-Appellant,

v.

MITSUBISHI CORPORATION, a corporation
organized under the laws of Japan; et al.,
Defendants-Appellees.

December 18, 2003, Filed

Before: SKOPIL, HALL and GRABER, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing. Judge Graber has voted to deny the petition for rehearing en banc and Judges Skopil and Hall have recommended denial. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.